STATE OF SOUTH CAROLINA
In the Supreme Court

CERIORARI TO SPARTANBURG COUNTY
Deadra L. Jefferson, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No: 2015-000820

JOHN WILLIE MACK, JR. PETITIONER

--- VS ---

STATE OF SOUTH CAROLINA, RESPONDENT.

PRO SE PETITION FOR WRIT OF CERTIORARI

Prepared by:

JOHN WILLIE MACK, JR.
Lee Correctional Institution
990 Wisacky Highway
Bishopville, South Carolina
29010

PETITIONER, PRO SE

TABLE OF AUTHORITY

UNITED STATES CONSTITUTION:

Sixth Amendment

Fourteenth Amendment

UNITED STATES CASE LAW:

Ex PARTA BAIN, JR., 121 U.S. 1, 7 S.Ct. 781

BRADY -vs- MARYLAND, 373 U.S. 83 (1963)

U.S. -vs- DELO, 422 F.2d 478, 495 (1st.Cir.1970)

U.S. -vs- BAHAMODE, 445 F.3d 1225-1228 (9th.Cir.2006)

SOUTH CAROLINA CASE LAW:

STATE -vs- BENTON, 338 S.C. 151, 326 S.E.2d 229

STATE -vs- CONDREY, 349 S.C. 184, 562 S.E.2d 320

GIBSON -vs- STATE, 514 S.E.2d 320

BAGWELL -vs- STATE, 410 S.C. 259, 763 S.E.2d 630

STATE -vs- SOWELL, 85 S.C. 278, 69 S.E. 316

OTHER AUTHORITY:

S.C Code Ann. §16-11-311

S.C. Code Ann. §17-19-100

S.C. Criminal Rule 5

DNA TESTING; EVIDENCE PRESERVATION

§17-28-90

§17-28-100

§17-28-320(a)(c)

Petitioner appeal on the Post-Conviction Relief matter, case No: 2013-CP-42-2063, has merit and the JOHNSON Petition for Writ of Certiorari filed by Deputy Chief Appellate Defender, Wanda H. Carter, should be dismissed and the merits of petitioner's Post-Conviction Relief Appeal on the Order of Dismissal, filed by Judge Deadra L. Jefferson, should be heard and decided in the Supreme Court of South Carolina.

ARGUMENT:

Attorney Wanda H. Carter stated in the JOHNSON Petition for Writ of Certiorari on page 9 of the JOHNSON Petition, Attorney Wanda H. Cater stated: "she has pursuant to JOHNSON -vs- STATE 294 S.C. 310, 364 S.E.2d 201 (1988) briefed the one arguable legal issue which arose during the Post-Conviction Relief Process."

The issue presented to the Supreme Court by attorney Wanda H. Carter, was not an issue that the petitioner presented in petitioner's Post-Conviction Relief Application or at petitioner's P.C.R. hearing, held January of 2015. This shows the lack of attention that was given to petitioner's case to this court.

STATEMENT OF FACTS

Petitioner, John W. Mack, Jr., was convicted of Burglary (1st) and Grand Larceny, per jury trial held during the February 22-23, 2011, term of Spartanburg County General Sessions Court, before Judge J. Derham Cole.

Petitioner was sentenced to Life imprisonment on the Burglary (1st) conviction (LWOP) and five years on the Grand Larceny conviction. Roger Poole, represented petitioner at trial and Assistant Solicitors, Barry J. Barnette and Anthony L. Liebert on the states behalf.

Petitioner appealed on the grounds that the trial court erred in denying petitioner's Motion to Quash the Indictment, for Burglary (1st); and trial court erred in denying petitioner's Motion for Direct Verdict, when state did not present sufficient evidence that John W. Mack, Jr., committed the Burglary (1st) and Grand Larceny offenses. Petitioner's appeal was dismissed.

On September 27, 2012, petitioner filed an Application for Forensic DNA Testing under §17-28-30 of the DNA Testing Act. The hearing to that Application was held under §17-28-90 on October 31, 2014. Application was denied by Trial Judge Derham Cole on May 19, 2015.

On May 6, 2013, petitioner filed an Application for Post Conviction Relief with the Spartanburg County, Office of the

Clerk. The respondent filed a Return dated, March 2014. A PCR hearing was held on January 14, 2015, at the Spartanburg County Courthous before Judge Deadra L. Jefferson. Petitioner was present at the hearing and represented by Leah B. Moody. Assistant Attorney General Suzanne H. White appeared on behalf of the state.

On April 6, 2015, Judge Jefferson issued an Order of Dismissal therein denying petitioner's allegations of Ineffective Assistance of Counsel in the case.

Petitioner appealed Judge Jefferson's Order of Dismissal. Wanda H. Carter filed a JOHNSON Petition for Writ of Certiorari. The Supreme Court of South Carolina directed petitioner on October 20, 2015, to file a PRO SE BRIEF to the Johnson Petition filed by petitioner's counsel; and in that response petitioner "<u>may</u> <u>raise</u> <u>any</u>" issues petitioner believes the court should consider in this appeal.

This PRO SE PETITION of petitioner now follows:

PETITIONER'S "PRO SE" BRIEF

Petitioner presents issues that should be judge or decided in The Supreme Court of South Carolina.

ISSUE [1], Argument:

Petitioner presented an issue in petitioner's P.C.R. Application that dealt with an objection that should have been made by trial counsel, Roger Poole, concerning the past criminal history of petitioner being admitted as exhibits in front of the jury before trial Judge Cole gave his instruction to the jury on limited admissibility. Solicitor Leibert went into detail concerning petitioner's past criminal history as well. READ: Trial Transcripts, page 126, lines 6-18. Trial Judge Cole did not give his limited admissibility to the past history until the jury charge. READ: Trial transcripts, page 148, lines 21-25 and page 149. I bring case STATE -vs- BENTON, 338 S.C. 151, 326 S.E.2d 229 (2000), to this courts attention. This case was "affirmed" by this court; however, in that case it mentioned at 6. Criminal Law - key 369.2(6) and 7. Criminal Law - key 673(5).

(6.7). To ensure a defendant is not convicted on an improper basis while allowing the state to prove the elements of First Degree Burglary. The trial court should limit evidence to the prior Burglary and/or House Breaking convictions, as it did here.

Particular information regarding the prior crimes should not be admitted. Additionally, the trial court, as it did here, should, on request, instruct the jury on the limited purpose, for which the prior crime evidence can be considered. RULE 105, SCRE.

Attorney Roger Poole knew that the past criminal history were not exhibits. Attorney Roger Poole should have made an "OBJECTION" to Solicitor Leibert admitting them as such. This prejudiced petitioner to a fair trial to suggest past criminal history as evidence.

Solicitor gave particular information of past criminal history as evidence: READ: trial transcripts, page 126 (Closing Arguments, lines 6-18), which he stated: "and exhibit 4 that I just read to you 89-2367, that was the dwelling of Mr. Thomas Williford, March 4th of 1999., V.F.W. Club, February 17th of 1988, Li'L Cricket, November 17th of 1998.

ISSUE [2], Argument:

Petitioner presented an issue to the P.C.R. Court that dealt with trial counsel Roger Poole failing to make an Objection to the amendment to the Indictment. Petitioner submitted the case Ex Parta BAIN, JR., (March 28, 1887) 121 U.S. 1, 7 S.Ct. 781 to explain to the P.C.R. Court why an objection should have been made by trial counsel Roger Poole to the amendment of the Burglary Indictment.

Before trial was had, petitioner discussed this matter concerning the time frame of the Burglary Indictment. Roger Poole stated to petitioner, we will discuss the matter later. Petitioner and attorney Roger Poole did not discuss the matter until trial court amended the Burglary Indictment.

During the Post-Conviction Relief hearing attorney Roger Poole never stated that petitioner was not taken by surprise, but stated he was taken by surprise. REVIEW: Appendix, page 231, line 1. Petitioner was taken by surprise: READ Title 17, section 17-19-100, which reads:

> If (a) there be any defect in form in any indictment or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the court before which the trial shall be had may amend the

indictment (according to the proof, if the amendment be because of a variance) if such amendment does not change the nature of the offense charged. After such amendment the trial shall proceed in all respects and with the same consequences as if the indictment had originally been returned as so amended, unless such amendment shall operate as a surprise to the defendant in which case the defendant shall be entitled, upon demand, to a continuance of the cause.

In a motion before trial on the same day as trial, the trial court stated that the Burglary Indictment should be reflected as those that are in the Grand Larceny (Trial Transcripts, page 7, lines 19-25).

However, in trial it was never stated that the items was in petitioner's control, or carry away goods from Larhonda. Petitioner brings STATE -vs- CONDREY, 349 S.C. 184, 562 S.E.2d 320. In that case at 6. Larceny, Key 3(1), it stated:

> To make out the offense of Larceny, the taking must be done Animo Furandi, or with a view of depriving the true owner of his property and converting it to the use of the offender.

How do the trial court know if Grand Larceny was committed on the same time as the Burglary, when the state can

not show what particular day the Grand Larceny took place?

ISSUE [3], Argument:

Petitioner presented an issue in petitioner's P.C.R. Application that dealt with applicant right to a fair trial guaranteed by the sixth amendment to the United States Constitution and South Carolina Law denied as a result of misconduct to DNA Evidence.

Under BRADY -vs- MARYLAND, 373 U.S. 83 (1963). the prosecution has an affirmative duty to make available to the defense any evidence which is exculpatory for the defense in a criminal trial. In this case police officer John David Burgess alleged that he discovered blood on household material. This blood evidence was virtually the only piece of physical evidence that was argued to tie petitioner to a crime scene during petitioner's trial, on March 7, 2006. Attorney Karen Quimby submitted on behalf of petitioner a "Notice of Appearance" and "Request for Discovery." (Exhibit A, Document has been added). Under Criminal Procedure of South Carolina RULE 5 which states:

> Part A: statement to defendant. Upon request by a defendant the prosecution shall permit the defendant to inspect and copy or photograph any relevant written or recorded statements made by the defendant or copies thereof within the possession, custody or control of

the prosecution. The existence of which is known, or by the exercise of due diligence may become known to the attorney for the prosecution intends to offer in evidence at the trial made by the defendant whether before or after arrest in response, to interrogation by any person then known to the defendant to be a prosecution agent.

Part B: Defendants prior records

Part C: Documents and Tangible Objects.

Part D: Reports of Examinations

Pictures as petitioner requested in his Motion in RULE 5.

Petitioner filed an DNA Application on September 27, 2012 under §17-28-30 to have the tangible objects tested by petitioner under DNA Act §17-28-10 through §17-28-120 with the Spartanburg County Office of the Clerk of Court. A hearing was held under DNA Act §17-28-90 on October 31, 2014 and decided five (5) and one-half (5½) months later on May 18, 2015. (A copy of the hearing can be had under §17-28-90(a)).

An appeal for the DNA Hearing was held under §17-28-90(6). The State submitted an argument to Judge Cole. Judge Cole heard the hearing. Petitioner's attorney Leah B. Moody, for the DNA hearing did not submit anything on the

petitioner's behalf. However, attorney Leah B. Moody gave an argument at the hearing heard on October 31, 2014. Attorney Leah B. Moody filed an appeal on the DNA Hearing but filed late and also filed in the wrong court which was the Supreme Court. The Supreme Court sent an order to petitioner pursuant to RULE 204(a) and transferred the appeal to the South Carolina Court of Appeals. The Court of Appeals of South Carolina denied the appeal because petitioner's attorney on the DNA appeal was late.

Petitioner's attorney Tiffany L. Butler on the DNA Appeal from the indigent appellate defense sent petitioner a §2254 Form. A form to file a Writ of Habeas Corpus in Federal Court. Petitioner instead filed a second Post-Conviction Relief Action for ineffectiveness of DNA counsel Leah B. Moody. Petitioner is waiting on return on P.C.R. Application. (have added a copy of second P.C.R.). Petitioner need to have the tangible objects to exhaust his state remedies concerning the DNA. The tangible objects were used against petitioner as witnesses, under the sixth (6th) amendment. I have a right to confront any witnesses. the state told a jury that petitioner's blood was on the tangible items that were alleged tested.

Why petitioner can not have the tangible items tested once under the DNA Act §17-28-10 through §17-28-120?

Petitioner requested the tangible items before a trial was held. In GIBSON -vs- STATE, 514 S.E2d 320 states:

The overriding theme of the BRADY cases, is the emphasis the Supreme Court has placed on the prosecutions responsibility for a fair play in cases. The prudent prosecutor as the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done to character of the evidence, not the character of the prosecution.

ISSUE 4; Argument:

Petitioner presented an issue to the Post Conviction Relief Court that dealt with applicant was dined the effective assistance of counsel guaranteed by the Sixth Amend. and Fourteenth Amend. to the U.S. Constitution when trial counsel failed to secure an "objection" to swabs being admitted into evidence when state did not produce these tangible items or pictures that state alleged was swabed before the or during trial.

Trial counsel, Roger Poole, did not discuss the case with attorney Karen Quimby, when counsel, Roger Poole took over the Burglary and Grand Larceny case. However, attorney Roger Poole, should have known that petitioner and attorney Karen Quimby wanted to inspect the tangible objects and pictures from the location to were the blood was found from her notes and files .

At the P.C.R. hearing, held in January 14, 2015. Attorney Roger Poole stated in the P.C.R. hearing at Appendix, page 57, lines 5-6.

"Well I had inherited the files and their notes and all of their work product."

Attorney Roger Poole should have made an "objection" to

swabs being admitted as evidence when petitioner and attorney Karen Quimby and himself did not inspect the tangible objects to were the swabs came from, after making a RULE 5 SCRCrim.P. request.

Attorney Roger Poole intention was never to have the tangible items tested because he only went with the state's version.

Petitioner brings case BAGWELL -vs- STATE, 410 S.C. 259, 763 S.E.2d 630 to the Supreme Court, to show and explain petitioner's position on the DNA evidence that prejudiced petitioner to a fair trial by Roger Poole.

IN:... BAGWELL, the Appellate Court found:

(1)...The petitioner in a post conviction relief (P.C.R.) hearing bears the burden of establishing his entitlement to relief.

(3)...A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonable available evidence tending to rebut any aggravating evidence introduced by the state. U.S.C.A. Const. amend 6.

(5)...At a minimum, criminal defense counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.

(7)...Trial counsel's decision not to seek DNA testing of blood found on pieces of glass from victims' patio door amounted to deficient performance , supporting defendant's ineffective assistance of counsel claims;... state used the blood pieces of glass as circumstantial evidence of BAGWELLS guilt.

In JOHN WILLIE MACK, JR., case the state used the light switch, entertainment center and bookshelf to petitioner's guilt. At the P.C.R. hearing, at APPENDIX, page 2310, lines 16-18, Attorney Roger Poole stated:

"It is highly uncommon you don't introduce items with blood on them; especially theses days into evidence. Where they can be looked at by a jury and/or touched."

Petitioner has the right to look and touch the evidence under the Sixth (6th) Amendment because, they are witnesses and the petitioner has the right to confront witnesses against him. A

RULE 5 Motion was filed, petitioner filed a DNA Application for petitioners' independent investigation and still NO tangible items have been produced by the state. Attorney Roger Poole's deficient performance violated petitioner's Sixth (6th) Amendment right.

In the cross examination in the P.C.R. Hearing APPENDIX, page 44, lines 19-25, attorney Leah B. Moody asked attorney Roger Poole did he have an opportunity to talk to Mr. Mack about how that DNA affected his probability of being found not guilty?

A:... Oh we talked about that alot.

Q:... Okay, and during your discussions, did you-all-talk about possibly having an "Expert" test those -- the DNA that was found?

A:... I didn't really go there to much because Mr. Mack whenever we talked, he wanted to talk about other things other than that. In otherwords I felt uneasy about getting an Expert to do an independent DNA test, because, if it had come back to Mr. Mack, then we would of had one further confirmation to deal with rather than just one SLED confirmation.

At this day and time petitioner is still confused to were the swabs came from. Did the swabs come from a crime scene? Did the state use the swabs requested from DNA hearing or the "Schmerber Motion" held September 12, 2008 before Judge Clifton Newman. During that hearing Solicitor Leibert used petitioner's pending charges at trial hearing and also petitioner's past history to collect swabs from petitioner. There were not any tangible items or pictures presented to show blood location to why the state wanted more blood. NO EXHIBITS.

(EXHIBIT B, has been added of the hearing for this court's inspection.)

The state put the swabs to the Chain of Custody on trial. The chain starts at the tangible items that alleged blood was located on.

ISSUE: 5, Argument:

Petitioner presented an issue in petitioner's P.C.R. Application that dealt with the misconduct of the police and the solicitor with regards to the DNA Evidence.

Under BRADY -vs- MARYLAND, 373 U.S. 83 (1963), the prosecution has an affirmative duty to make available to the defense any evidence which is exculpatory for the defendant in a criminal trial.

In this case, Warrant No: K-112716; K-112716 and Indictment No: 2006-GS-42-1167. The police officer, John David Burgess recovered blood on a lightswitch, entertainment center and bookshelf. This evidence was virtually the only alleged piece of physical evidence that was argued by the state (solicitors) to tie petitioner to a crime scene.

Under RULE 5, SCRCrim.P., the defendant has a right to inspect tangible items, pictures, documents and reports. Police officer John D. Burgess, and at that time, solicitor Trey Gowdy did not turn over the tangible items or photographs to petitioner, where alleged blood was located. The record shows that a entertainment center, bookshelf, lightswitch was allegedly swabed. (Exhibit C, the Police Incident Report submitted by J.E. Gallman and Burgess, added to pro se filing).

During a DNA hearing held by the state before Judge

Clifton Newman, Anthoney C. Leibert made a appearance for the state and attorney William McPherson for petitioner, date held September 12, 2008. Transcript of Record 2006-GS-42-1166, 1167 (Exhibit B, transcript of Record added to Pro Se Brief.)

At that hearing Anthony C. Leibert did not submit to the lower court pictures of tangible items or physical evidence that he suggested blood was located on. Anthony C. Leibert put emphasis on petitioner's pending charges, and past history to get a DNA test conducted with out presenting the tangible items with blood on them to petitioner.

In 2012 petitioner filed a DNA Application to have the tangible items tested to show exculpatory evidence. A hearing was held after petitioner wrote to the Supreme Court many letters complaining about a hearing on the matter. On October 31, 2014 a hearing was held before Judge Cole. In that hearing solicitor Barry Joe Barnette stated no longer has the tangible items. Judge Cole told both sides to submit a "Brief" on the issues and he would make a decision. Barry Barnette submitted a Brief for the state. Leah B. Moody for Petitioner, did not file a "Brief." In turn petitioner's DNA Testing Application was denied.

Leah B. Moody filed an appeal under §17-28-90(g). The appeal was late and in the wrong court. Petitioner filed a second P.C.R. Application (C/A #2015-CP-42-3806), for ineffective of DNA Counsel that's still pending. (Have added copy of P.C.R.).

Petitioner has the right to have the tangible items

under the sixth (6th) Amendment, because the tangible items was used by the state to show petitioner's guilt. (BAGWELL -vs- STATE, 410 S.C. 259, 763 S.E.2d 630).

Petitioner must confront the tangible items for exculpatory evidence because the state used the tangible items as witnesses. Under the Sixth (6th) Amendment the petitioner has a right to confront any witness.

Petitioner did not have a copy of DNA Hearing conducted on October 31, 2014. But a copy can be had under §17-28-90.

ISSUE 6: Argument:

Petitioner presented an issue to the post conviction relief court that dealt with applicant's right to a fair trial guaranteed by the sixth (6th) amendment to the United States Constitution and South Carolina Law was denied as a result of misconduct of the trial Judge Cole improperly stated only one aggravating circumstances to be proven when the state presented to petitioner an Indictment with all aggravating circumstances.

During jury charge, trial Judge Cole stated in this particular case the only element that fits is the category of the fourth element. (APPENDIX, page 146, lines 19 through page 148, lines 11-20). This statement charged the element from petitioner's indictment to only one (1) element when the state gave petitioner all the elements of First Degree Burglary to defend.

When petitioner was given a copy of the Arrest Warrant on February 28, 2006, it stated that petitioner committed the First Degree Burglary in the night time which is a element or aggravational circumstance.

If petitioner was only given the fourth element in the indictment from the state then petitioner would have known what element to prepare for trial.

Petitioner brings case STATE -vs- SOWELL, 85 S.C. 278,

67 S.E. 316 to show and explain petitioner's position on the issue of Judge Cole improperly stated only one (1) aggravating circumstance.

In SOWELL, the defendant stated that the offense had been committed in the daytime. At trial the indictment was amended to state that the offense was committed in the nighttime. This court noted that section 145 crated two distinct and difference offenses even through both belonged to the same class of felonies and were punishable in the same way.

The court held that the amendment was improper because it changed the nature of the offense as originally charged in the indictment.

Petitioner was charged with all the elements of First Degree Burglary but when trial Judge Cole stated "<u>In this particular case the only element that fits is the category of the fourth</u>." This changed the nature of the offense as originally charged in the indictment. Judge Cole really amended the indictment in a under cover way. This violated petitioner's Sixth (6th) amendment to a fair trial.

ISSUE 7: Argument:

Petitioner presented an issue to the post conviction relief court that dealt with applicant's right to effective assistance of counsel as guaranteed by the Sixth (6th) Amendment to the United States Constitution and South Carolina Law was violated as a result of counsel's failure to thoroughly and properly examine a crucial prosecution witness.

The solicitor called to testify the victim, Ms. Larhound Moss, whereby, Ms. Moss claims she was an eyewitness to seeing blood in her home. However, in a police report filed 9/11/2005, stated that J.E. Gallman and Burgess called Ms. Moss to ask her did she know anyone by the name (John Mack). Ms. Moss, stated; no one should have left blood on items that I processed.

This call was made by John Burgess to insinuate that he told Ms. Moss about the items with blood on them, During trial Ms. Moss said she saw blood on some items but when asked about entertainment center, Ms. Moss stated, "I think blood was found on the entertainment center. (APPENDIX, page 53, lines 10-11. Why didn't Ms. Moss have the items placed in evidence? Ms. Moss testimony was extremely damaging to the petitioner at the same time was highly suspect.

Trial attorney did not ask Ms. Moss anything concerning the blood being found, he asked question extremely damaging to the petitioner.

Petitioner discussed the police report with trial attorney Roger Poole because this was the only discovery that was received by petitioner, after Karen Quimby filed the RULE 5 Motion on March 5, 2006.

That is one issue that was discussed, and he was told about this situation when he visited petitioner in Spartanburg County jail. Attorney Roger Poole only wanted to discuss a PLEA, because petitioner had other charges, this violated petitioner's crossing on the witness of the evidence under the sixth and fourteenth amendments.

ISSUE 8; Argument:

Petitioner presented an issue to the post conviction relief court that dealt with applicant's right as guaranteed by the sixth (6th) amendment to the United States Constitution and South Carolina Law was violated when Ms. Moss perjured herself by deliberately making material false or misleading statement while under oath.

The police report received by petitioner filed September 1, 2005, stated that J.E. Gallman and Burgess, stated that Ms. Moss was called to be asked if she knew a John Mack. Ms. Moss stated no and that no one should have left blood on the items that Burgess processed items. Ms. Moss stated at APPENDIX, page 54, lines 2-8:

> A)... That same day when I came home and the house was broken into. I never went back.

That is why Ms. Moss was called so Burgess could let her know about alleged blood location. Ms. Moss perjured herself by deliberately making material false or misleading statements while under oath. (That same day when I came home and the house was broken into, I never went back").

Ms. Moss was called to be informed about the alleged

blood location, yet Ms. Moss stated on the stand she [illegible] saw the alleged blood on some items and she thinks she seen alleged blood on other items. APPENDIX, page 53, lines 1-11.

The perjury by Ms. Moss violated petitioner's right to a fair trial under the sixth amendment.

ISSUE; 9, Argument:

Petitioner presented an issue in petitioner's P.C.R. filing that dealt with the misconduct of counsel's failure to file for a speedy trial after petitioner requested in a letter to the Public Defenders Office. This violated petitioner's constitutional right guaranteed by the Sixth (6th) and Fourteenth (14th) Amendments of the United States Constitution and South Carolina Law.

Petitioner filed an Title 42 U.S.C. Federal Lawsuit in U.S. District Court because the lower court and petitioner's attorney was holding petitioner back from a fast and speedy trial. Petitioner wrote the Office of Disciplinary Counsel about attorney conduct in the matter. Petitioner wrote the Supreme Court of South Carolina concerning being incarcerated without trial. Petitioner lost witnesses, because the long delay. (Check the above office records from 2008, 2009 and 2010).

Petitioner wrote attorney Karen Quimby about filing motion for trial, but Karen Quimby did not write petitioner back. William McPhearson wrote back because Karen Quimby stopped working for the Public Defenders Office and started working with a new law office. William McPhearson wrote back asking if petitioner want to plea on charges. Petitioner wrote back

stating, petitioner would plea on a few charges, but wanted to move forward to trial on other charges. Petitioner was incarcerated in Wateree C.I. in 2006 when petitioner wrote letter concerning trial. Attorney William McPhearson was aware that petitioner wanted trial back in 2006-2007. Petitioner did not go to trial until February 22-23, 2011. William McPhearson violated petitioner's right to a fast and speedy trial.

U.S. - vs - DELEO, 422 F.2d 478,495 (1st.Cir.1970).

U.S. - vs - BAHAMONDE, 445 F.3d 1225-1228 (9th.Cir.2006)

CONCLUSION

Petitioner filed an DNA Application September 27, 2012 that was heard in the lower court under the DNA Act §17-28-90. On October 31, 2014 the matter was heard by Judge Cole. The DNA Act Application was also denied by Judge Cole on May 18, 2015. this matter was not added in the Appendix.

Petitioner needed to swab tangible items because they are objects the state claims petitioner's DNA was on. That's why petitioner filed DNA Act §17-28-30 to have them tested. During that hearing on October 31, 2014, attorney for the state Barry J. Barnette stated: "We don't have the items any longer." I don't have a copy of that hearing transcripts to show this court because it was not added into the Appendix, but a copy can be had under §17-28-90. Petitioner doesn't have a copy of the hearing transcripts held on October 31, 2014, because petitioner's attorney filed the appeal late and in the wrong court. (Exhibits have been added).

However, under DNA Testing, Evidence Preservation, §17-28-320, States:

Offense for which evidence preserved: Conditions and Duration of Preservation: (15) Burglary in the First Degree.

(A).. A custodian of evidence "MUST" preserve all physical

evidence and biological materials related to the conviction or adjudication of a person for at least one of the following offenses:.. Burglary in the First Degree for which the person is sentenced to ten (10) years or more (§16-11-3111(B)).

(C).. The physical evidence and biological material "MUST" be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (a).

Petitioner requested a continuance to the P.C.R. Court until after the DNA matter was decided, by Judge Cole. However, Judge Deadra L. Jefferson denied petitioner continuance because they were NOT INTERRELATED. APPENDIX, page 196, lines 8-16.

The DNA is related because the state used the DNA to convict petitioner and petitioner needed the test conducted to show his innocence; as well as, counsel's ineffectiveness under DNA testing, Evidence Preservation, §17-28-100.

(B).. The results of the DNA test may be used by the Applicant, Solicitor, or Attorney General in any post-conviction proceeding or trial.

When Judge Deadra L. Jefferson denied petitioner

continuance on the DNA being decided, before the P.C.R. hearing was conducted, it took petitioner's burden of proof to show allegation of trial counsel Roger Poole ineffective assistance. The DNA was the only evidence used to allegedly place petitioner at a crime scene, so the DNA should have been investigated by Roger poole. The continuance should have been granted.

All the above issues presented to the Supreme Court of South Carolina by Pro Se petitioner, John Willie Mack, Jr. is submitted to be considered in Writ of Certiorari to the Supreme Court of South Carolina from denied post-conviction relief, by Judge Deadra L. Jefferson in post-conviction hearing held on January 14, 2015.

DNA is the only evidence the state alleged that was discovered. Pictures was said to be lost at trial. The tangible items was said to be done away with at the DNA hearing.

Petitioner can not exhaust his state remedies without the tangible objects. Petitioner has a right to conduct a DNA test on the access to justice Post-Conviction DNA Act. The state alleged they conducted at least two (2) DNA test, petitioner only requested to be allowed one.

Petitioner's pending charges or past history is not evidence.

Petitioner prays that this Honorable Court vacate conviction and sentence and grant petitioner a new trial, but not limited to, the merits of the Pro Se Brief.

Respectfully submitted

JOHN WILLIE MACK, JR.
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29010

PETITIONER PRO SE.

Executed on the 16 day of November, 2015.